United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Affidavit

75-6115
76-6022
76-6081

To be argued by
CHARLES FRANKLIN RICHTER

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket Nos. 75-6115, 76-6022, 76-6081

THE STATE OF NEW YORK,
Plaintiff-Appellant,

—*against*—

THE NUCLEAR REGULATORY COMMISSION, and WILLIAM ANDERS as Chairman; THE ENERGY RESEARCH and DEVELOPMENT ADMINISTRATION and DR. ROBERT C. SEAMANS as the Administrator; THE DEPARTMENT OF TRANSPORTATION, and WILLIAM T. COLEMAN as Secretary of Transportation; THE DEPARTMENT OF STATE and HENRY A. KISSINGER as Secretary of State; THE CIVIL AERONAUTICS BOARD and ROBERT D. TIMM as the Chairman; THE FEDERAL AVIATION ADMINISTRATION and ALEXANDER P. BUTTERFIELD as the Chairman; THE UNITED STATES CUSTOMS SERVICE and VERNON B. ACREE as Commissioner and FRED R. BOYETT as Regional Commissioner,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS-APPELLEES' BRIEF

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York,
Attorney for the Defendants-Appellees.

CHARLES FRANKLIN RICHTER,
NATHANIEL L. GERBER,
SAMUEL J. WILSON,
Assistant United States Attorneys,
Of Counsel.

UNITED STATES COURT OF APPEALS
FILED
JUN 29 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

2

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 75-6115, 76-6022, 76-6081

THE STATE OF NEW YORK,
Plaintiff-Appellant,

—against—

THE NUCLEAR REGULATORY COMMISSION, *et al.*,
Defendants-Appellees.

DEFENDANTS-APPELLEES' BRIEF

Preliminary Statement

Plaintiff-Appellant, State of New York, has brought this consolidated appeal from three decisions of United States District Judge William C. Conner. The first, dated September 9, 1975, denied the motion of appellant for a preliminary injunction enjoining all actions of defendants-appellees which permit or execute the transport by air and related connecting transport of special nuclear material in and over the United States and its territories. (A. 895-911) * Appellant sought the injunction based upon the alleged failure of appellees to satisfy the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, by not preparing an environmental impact statement ("EIS") on the air

* "A." refers to the Joint Appendix filed in connection with this appeal. "S.A." refers to the two volume Supplemental Appendix.

transportation of special nuclear materials ("SNM"). Plaintiff filed its Notice of Appeal on November 7, 1975. (A. 912-913)

The second decision, dated December 23, 1975, granted the motion of appellees Civil Aeronautics Board ("CAB") and the United States Customs Service ("Customs") to dismiss them from this action. (A. 922-927)

On December 12, 1975, appellant made another motion for a preliminary injunction seeking relief nearly identical to that sought in its first motion, except that as to one particular SNM, enriched uranium, it sought to halt commercial air transportation and replace it with military air transportation. At the same time, appellant also sought partial summary judgment declaring appellees in violation of NEPA and an order establishing a timetable by which appellees would take certain actions leading to a final EIS.

In the third decision, dated May 7, 1976, the district court denied the motion for partial summary judgment. As to the motion for a preliminary injunction, the Court held that (1) it lacked jurisdiction because the matter was already on appeal and (2) appellant would have to obtain permission of this Court before an evidentiary hearing, which the district court deemed necessary, could be held on the motion. (S.A. 1190-1207)

In April 1975, prior to commencement of this action, appellee Nuclear Regulatory Commission ("NRC") announced that it would prepare an EIS concerning the air transportation of all radioactive materials, including SNM, as part of a review of its regulations and to assist in conducting a rulemaking proceeding on the air transportation of radioactive materials. (A. 218-219, 249-250) A draft EIS covering the transportation of radioactive

materials by air and other modes was issued for comments in March 1976.* Copies were sent to the district court and to appellant. At the time this brief is written it is anticipated that the final version will be completed by November 1976.**

Issues Presented

1. Did the district court abuse its discretion by its September 9, 1975, order denying appellant's first motion for a preliminary injunction?

2. Does this Court have jurisdiction over the appeal from that part of the district court's May 7, 1976 decision concerning appellant's second motion for a preliminary injunction? If the Court has jurisdiction, did the district court properly hold that it lacked jurisdiction over the motion?

3. Does this Court have jurisdiction over the appeal from that part of the district court's May 7, 1976 decision denying appellant's motion for partial summary judgment? If this Court has jurisdiction, did the district court properly deny appellant's motion for partial summary judgment?

4. Does this Court have jurisdiction over the appeal from the district court's December 23, 1976 order, dis-

---

* The draft EIS constitutes Volume II of the Supplemental Appendix filed in this proceeding. The draft contains a detailed summary at pages xvii through xxiv.

** The affidavit of Robert F. Barker, sworn to January 15, 1975, stated that the draft EIS would be available for public comment in late February or early March 1976, and that the final document was expected to be available by early October. (S.A. 1164) The approximately one month delay now anticipated in completing the EIS is required in order to analyze the detailed comments received on the draft.

missing appellees CAB and Customs from this action? If this Court has jurisdiction, did the district court properly dismiss the complaint as to these appellees for failing to state a claim for relief against them?

FACTS

Uses of SNM

SNM are (1) plutonium and (2) uranium enriched in either of the isotopes 235 ("U-235") or 233 ("U-233").* Plutonium is principally produced by exposure of uranium to neutrons in a nuclear reactor. Enriched uranium is produced by increasing the percentage of U-235 found in natural uranium. Uranium is called high enriched if it has been enriched in U-235 to 20 percent or more by weight and low enriched if enriched to a lesser extent. (A. 237) As of the present time, uranium enriched in U-233 is only available in experimental quantities. (A. 389, 642)

SNM are used extensively both in the United States and abroad in the commercial production of electrical power, medicine, industry and research, as well as for military purposes. Uranium with a low enrichment of between two and four percent of U-235 is the fuel used in commercial nuclear energy plants which produce electrical power. As of May 1975 there were 53 such plants in the United States producing seven percent of the nation's electrical output, and 95 such plants in 15 foreign countries. (A. 215-216)

Plutonium is used experimentally in the United States as a nuclear reactor fuel and is more exten-

---

* SNM is defined in Section 11(aa) of the Atomic Energy Act of 1954, 42 U.S.C. § 2014(aa).

sively used in Europe for this purpose. Plutonium is also used in medicine to power heart pacemakers which have been implanted in hundreds of persons both here and abroad. Similarly it is used in many radioisotopic thermal electric generators where a reliable, long-lasting power source is essential, such as in lunar aircraft, orbiting spacecraft and deep sea research. (A. 216)

Both plutonium and enriched uranium are also extensively used in basic research in nuclear physics and on nuclear materials, as well as in applied research to develop better and safer nuclear reactors for commercial use. There are in addition many research reactors throughout the United States using high enriched uranium as a fuel source. (A. 216-217)

As authorized by the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 *et seq.*, the United States is a principal supplier of nuclear materials, including SNM, and equipment for foreign countries. It is a party to approximately 29 Agreements for Cooperation with 28 foreign countries and with two international organizations (the International Atomic Energy Agency and the European Atomic Energy Community) under which it exports nuclear materials and equipment. The principal recipients are the industrial countries of Western Europe and Japan with which the United States maintains its most important political, economic and defense relationships. Under many of these agreements, SNM are also imported into the United States where they are processed and then reexported. (A. 269)

Our role as a principal supplier of nuclear materials permits the United States to further its foreign policy objective of curtailing the proliferation of nuclear weapons. Thus, section 123 of the Atomic Energy Act, 42 U.S.C. § 2153, requires that Agreements for Cooperation contain, among other things, guarantees that (a) the

cooperating party will maintain security safeguards and standards as set forth in the agreement, (b) except for agreements for military uses, the cooperating party will not use materials it receives for any military purpose, and (c) any material made available under the agreement will not be transferred to unauthorized persons or beyond the jurisdiction of the cooperating party, except as the agreement may provide. (A. 269-271)

Functions of the Appellees

Appellee NRC is responsible for the regulatory functions of the former Atomic Energy Commission (the "AEC"), which the NRC and appellee Energy Research and Development Administration ("ERDA") replaced pursuant to the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801 *et seq.* The NRC's functions include licensing possession and transfer of SNM and developing and enforcing standards for most containers in which SNM are transported. This authority extends to import and export as well as domestic licensing. (A. 217, 908)

Licenses issued by the NRC authorize the licensee to receive, possess, use and transfer the radioactive materials specified in the license. The NRC does not specify the mode of transport to be used; the applicable regulations are considered to provide adequate safety by any mode.

Possession and the right to transfer or receive SNM may also be authorized by states pursuant to section 274 of the Atomic Energy Act, 42 U.S.C. § 2021. Under that section a State may enter into an agreement with the NRC whereby the State assumes regulatory control over certain uses and shipments within the State of certain quantities of radioactive materials. These include the regulation of up to 200 grams of plutonium,

350 grams of uranium U-235 or 200 grams of uranium U-233 at any one location within the State. New York State became such an "Agreement State" on October 15, 1962. (A. 255-256)

Appellee Department of Transportation ("DOT") has overlapping responsibilitity with the NRC for reviewing and developing safety standards governing the handling and storage of SNM while in the possession of a common, contract or private carrier. (A. 217, 908) Pursuant to the Hazardous Materials Transportation Act of 1974, 49 U.S.C. §§ 1801 *et seq.*, and 49 C.F.R. § 1.53 as amended by 40 Fed. Reg. 30821, the authority within DOT to regulate the transportation of hazardous materials, including SNM, now resides in the Materials Transportation Bureau of DOT. Prior to passage of that act, appellee Federal Aviation Agency ("FAA") was the operating administration of DOT responsible for such safety standards as they involved transportation of SNM by commercial passenger or cargo aircraft.

The remaining appellees do not regulate the possession or transportation of SNM. Appellee ERDA has assumed the operational functions of the AEC. ERDA is responsible for, among other things, production of SNM at its facilities and for research in which SNM are used. (A. 232-235, 909) Accordingly, ERDA itself makes or arranges domestic shipments of SNM between its various plants and laboratories and between Department of Defense installations, as well as between commercial fuel fabricators and independent research centers. Most of ERDA's shipments relate to defense programs of the United States. (A. 233, 909) While ERDA is not required to obtain a license from the NRC to ship SNM, as a matter of policy, it meets all NRC and DOT requirements except where national security requires special safeguard procedures. (A. 233-234)

Appellee Department of State negotiates Agreements for Cooperation with foreign countries for SNM and for other nuclear materials and equipment. (A. 269, 909) ERDA is responsible for administering these Agreements. Most international shipments of SNM made pursuant to such agreements are of enriched uranium used to fuel reactors abroad. (A. 232, 909)

Appellee CAB has no direct involvement in regulating SNM because it does not license the carriage of any particular cargo. (A. 909) The only involvement of appellee Customs is to ensure that SNM enter or leave the United States only if the shipper has a valid license issued by the NRC or qualifies for one of the specific exemptions from the licensing requirements as established by NRC regulations. (A. 909)

Federal Statutes and Regulations

The transportation of SNM is subject to extensive statutory and regulatory control. Under the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq.*, and the Energy Reorganization Act of 1974, 42 U.S.C. § 5801 *et seq.*, SNM may only be transported within, into or out of the United States by NRC and Agreement State licensees and by ERDA.*

Effective August 9, 1975, Congress prohibited the air transportation of plutonium, other than in a medical device designed for individual human application, until NRC certifies to Congress that the plutonium will be carried in a container that will survive the crash and explosion

---

* The Department of Defense may also transport SNM; however it is not a party to this action.

of a high-flying aircraft. Section 201 of the NRC Appropriations Act, 89 Stat. 413 (1975), (the "NRC Act") provides:

> The Nuclear Regulatory Commission shall not license any shipments by air transport of plutonium in any form, whether exports, imports or domestic shipments: *Provided, however,* That any plutonium in any form contained in a medical device designed for individual human application is not subject to this restriction. This restriction shall be in force until the Nuclear Regulatory Commission has certified to the Joint Committee on Atomic Energy of the Congress that a safe container has been developed and tested which will not rupture under crash and blast-testing equivalent to the crash and explosion of a high-flying aircraft.

Shortly after the law became effective, NRC ordered its licensees not to ship plutonium by air and, at NRC's request, Agreement States took similar action. (S.A. 1186)

Subsequent to the NRC Act, Congress passed an appropriations act for ERDA, 89 Stat. 1063 (1975), which became law on December 31, 1975. Sections 501 and 502 (the "ERDA Act") placed a similar restriction on air shipments of plutonium by ERDA, except that air shipments are permitted in certain circumstances such as for purposes of national security. These sections provide as follows:

> Sec. 501. The Energy Research and Development Administration shall not ship plutonium in any form by aircraft whether exports, imports, or domestic shipment: *Provided,* that any exempt shipments of plutonium, as defined by section 502, are not subject to this restriction. This restriction shall be in force until the Energy Research and

> Development Administration has certified to the Joint Committee on Atomic Energy of the Congress that a safe container has been developed and tested which will not rupture under crash and blast testing equivalent to the crash and explosion of a high-flying aircraft.
>
> Sec. 502. For the purposes of this title, the term 'exempt shipments of plutonium' shall include the following:
>
> (1) Plutonium shipments in any form designed for medical application.
>
> (2) Plutonium shipments which pursuant to rules promulgated by the Administrator of the Energy Research and Development Administration are determined to be made for purposes of national security, public health and safety, or emergency maintenance operations.
>
> (3) Shipments of small amounts of plutonium deemed by the Administrator of the Energy Research and Development Administration to require rapid shipment by air in order to preserve the chemical, physical, or isotopic properties of the transported item of material.*

By letter dated April 13, 1976, appellees informed the district court that since January 1976, when the ERDA Act became effective, ERDA had made 13 air shipments of plutonium, all of which were for purposes of national security. (S.A. 1187)

As to air shipments of enriched uranium, these too have been limited. Pursuant to 49 U.S.C. § 1807, they may not be made on passenger aircraft unless intended for use in research or medical diagnosis or treatment.

---

* The Administrator of ERDA has promulgated rules pursuant to § 502(2) as to what air shipments are authorized to be made for purposes of national security. 41 Fed. Reg. 6259 (Feb. 12, 1976).

Otherwise, air shipments must be made on all-cargo flights.*

In addition to these statutes, the transportation of SNM is also subject to extensive federal administrative regulations. Federal safety regulations governing the shipment of radioactive materials were first adopted in 1948 and have been extensively revised over the years. The present federal container and safety regulations governing the transportation of radioactive materials are essentially the same as those of the International Atomic Energy Agency of the United Nations, which has been entrusted with the formulation of standards pertaining to the worldwide transportation of radioactive materials. Its standards have been adopted by every international transportation agency and almost all of its 77 member countries, including Canada, France, West and East Germany, Japan, the Union of Soviet Socialist Republics and the United Kingdom. (A. 287-289)

---

* Section 1807 provides in relevant part:

> Within 120 days after January 3, 1975, the Secretary shall issue regulations, in accordance with this section and pursuant to section 1804 of this title, with respect to the transportation of radioactive materials on any passenger-carrying aircraft in air commerce, as defined in section 1301(4) of this title. Such regulations shall prohibit any transportation of radioactive materials on any such aircraft, unless the radioactive materials involved are intended for use in, or incident to, research, or medical diagnosis or treatment, so long as such materials as prepared for and during transportation do not pose an unreasonable hazard to health and safety. The Secretary shall further establish effective procedures for monitoring and enforcing the provisions of such regulations.

The DOT regulation called for by this section may be found at 14 C.F.R. 103.7, as amended by 40 Fed. Reg. 17141 (April 17, 1975).

Relevant regulations of the NRC may be found at 10 C.F.R. Parts 20, 70, 71 and 73. Relevant regulations of the DOT may be found at 14 C.F.R. Part 103 and 49 C.F.R. Parts 170 to 189. Appellant's complaint centers upon the regulations contained in 10 C.F.R. Part 71, covering the type of containers to be used to ship SNM, and in 10 C.F.R. Part 73, covering security arrangements for such shipments.

Other than in very small quantities, SNM must be transported in Type B containers which are designed to protect against both normal and accident conditions as specified in Part 71.* The safety standards contained in Part 71 were based upon two main considerations: (1) protection of the public from external radiation and (2) assurance that the contents of the containers are unlikely to be released during either normal or accident conditions. (A. 288) When the present NRC regulations governing tests for container integrity were proposed in 1965, appellant voiced no concern about the substance of the regulations even though it had full opportunity to do so. (A. 288-289) In fact, as an Agreement State it has repeatedly approved shipments of SNM in these containers and at least four air shipments of plutonium in 1974 originated from a plutonium storage facility owned and operated by appellant. (A. 255-256, 259)

Part 73 sets forth the security arrangements which must be made to guard against the theft or diversion of

---

* Type A containers, which are governed by DOT regulations, are used to carry very small quantities of SNM which even if released would not present a significant radiation safety problem. Thus, unlike Type B containers, they must withstand normal shipping conditions but not accident conditions. For example, less than one millicurie of plutonium (approximately less than two-thousandths of an ounce) may be carried in a Type A container while more than this amount must be carried in a Type B container. (A. 289n)

SNM while in transport. These regulations were revised in 1973 with an opportunity to comment. Appellant submitted no comments. (A. 426)

Safety Record of SNM Air Shipments*

SNM have been transported by civilian aircraft for the past 25 years during which time there has never been an aircraft accident involving them. (A. 219, 234) The probability of such an accident is remote and the probability of such an accident causing significant harm to significant numbers of persons is even more remote.

As to shipments of uranium enriched in U-235, an affidavit of John W. Gofman, submitted by appellant below stated that there is no hazard even if such uranium were released due to an aircraft accident. Agreeing with appellees' expert Robert Barker, Dr. Gofman stated:

> It is not necessary to discuss the special nuclear material, Uranium-235 at any degree of enrichment, since I do not consider it to present a radiological hazard even if dispersed. [A. 642; for Mr. Barker's statement see A. 390-391].

As to uranium enriched in U-233, the parties agree that this exists only in experimental quantities and is not transported by air. (See appellant's brief at 6n and 18n.)

---

* It should be noted that it is appellees' position that the recent statutes set forth on pages 9-11 above moot the safety and security issues appellant raises. As discussed in Point II below, Congress by its actions has sanctioned the very air shipments of SNM which appellant seeks to have enjoined.

As to plutonium, the factors to be considered in assessing the risks involved in its transportation by air are: (1) the low probability of an aircraft accident which could effect cargo carried on board, (2) the low probability of plutonium being on an airplane involved in an accident, (3) the ability of containers carrying plutonium to withstand accident conditions, and (4) the low probability of significant harm resulting even if an aircraft accident caused the release of plutonium.

Pursuant to 49 U.S.C. § 1807 and 14 C.F.R. §§ 103.7 and 103.19(d), almost all commercial air shipments of plutonium permitted by law are limited to all-cargo flights. The safety record of all-cargo flights by United States route carriers has been outstanding. In 1970, 61 million miles were flown with only three accidents. In 1971 and again in 1972 there was not a single accident. In 1973 there was only one and statistics in the record for 1974 show only two. (A. 280)

Moreover, the fact that an airplane is involved in an accident does not necessarily mean that its cargo would be damaged. In fact, the extent of cargo damage is not, as a practical matter, directly related to accident severity. (A. 277) Whether there would be damage to cargo depends upon a significant number of variables including location of the cargo within the plane, the stress absorbed by the plane, the impact absorbed by the aircraft and the resulting stress transmitted to the cargo. (A. 277-278)

Second, because the NRC and ERDA Acts prohibit almost all air shipments of plutonium, very few shipments are being made. Thus the probability of plutonium being aboard a plane involved in an accident is remote and the probability of it being aboard a plane involved in an accident which might effect cargo is even more remote.

Third, the standards to which a Type B container carrying plutonium or other SNM must conform ensure that the container would be unlikely to release its contents even were it involved in an aircraft accident causing substantial damage to the aircraft. (A. 289-295) While SNM have never been involved in a commercial aircraft accident,* the point is made by those that have been involved in ground transportation accident, all of which have withstood accident forces. For example, in one accident, a container fell from a railroad car onto the track. Despite the fact that the train ran over it with such force that several cars were derailed, the container remained intact without any leakage of its contents. (A. 284)**

Fourth, even assuming an aircraft accident causing the release of plutonium, it is still remote that significant harm would occur to significant numbers of persons because of the following large number of variables involved. (A. 387-400)

---

* There have been two military aircraft accidents, one in Spain and the other in Greenland, involving the release of SNM by United States Air Force planes carrying nuclear weapons. In neither instance was anyone injured. In both cases the SNM were in bombs and not in containers required by NRC regulations.

** For a detailed discussion of Type B containers and the standards they must meet, see the affidavit of Donald A. Nussbaumer. (A. 286-295) While appellant is correct that a study has shown that the impact standard required by NRC regulations for containers used to transport SNM will be exceeded in 22% of all aircraft accidents and the fire standard in 11%, that does not mean that an actual container will in fact fail even if it were in an accident exceeding these standards as appellant implies. (Appellant's Brief at 20; A. 293-294) A series of tests on actual containers used for transporting SNM showed that they can survive even more severe accident conditions than required by NRC standards. (A. 294)

Form of the plutonium. Plutonium may be shipped as a metal, a liquid or as particles. The radioactivity of plutonium has a low penetrating power so that it would produce only minor effects to small exposed portions of a person's skin if released. Plutonium can therefore only become a significant hazard if it is in an inhalable form. (A. 388)

Amount of plutonium released and dispersed. In order for plutonium in particulate or inhalable form to be a hazard, it must be dispersed, *i.e.*, taken up into the air, so that it could be inhaled. Thus the degree of danger would depend upon the amount of plutonium released and the portion of the released amount which is dispersed. A comprehensive study shows that 46 percent of all aircraft accidents will occur over water or soft soil, so that, even if a container carrying plutonium were involved it would either go under water or be buried with no plutonium being dispersed. (A. 292-293, 394) Similarly, if the material were spilled within a confined area, such as the cabin of the aircraft, the material could not be dispersed.

Even assuming that the plutonium in particulate form were released on the open ground, it would remain there except in unusual circumstances. Plutonium is relatively heavy—much heavier than would be a grain of sand of comparable size—and tends to adhere to other surfaces making it not readily dispersible by normal air turbulence. (A. 395-396) As to the amount likely to be dispersed into the air, experts at the International Atomic Energy Agency have concluded that 1/10 of 1% of the total contents of the container would be dispersed in the event of container failure due to an aircraft accident. This figure has been supported by studies done in the laboratory and of actual accidents where containers of

radioactive materials not designed to withstand accident conditions, unlike containers used to transport SNM, have failed. (A. 395)

Diffusion of the plutonium. Assuming dispersal, the next significant factor is diffusion, *i.e.*, the degree of concentration of plutonium in the air. The more diffused the particles the less likely they will significantly effect anyone, for the less plutonium that a person can inhale. The extent of diffusion itself depends upon a number of variables, including the height of the release, the size of the particles, the weight of the particles, and existing meteorological conditions including wind speed and the amount of turbulence in the atmosphere. (A. 396-397)

As may be seen, diffusion and dispersal are interrelated. For example, extremely windy conditions would be necessary in order to have a significant degree of dispersal, but these same winds would produce wide diffusion of the plutonium. Conversely, concentration of plutonium particles in the air would require stable atmospheric conditions, but under these circumstances the particles are least likely to be dispersed.

Particle size. Particle size is relevant not only to the degree of diffusion, but also to the effect of dispersed plutonium upon a person. Normal plutonium particles greater than 10 microns will not be inhaled into the nose. Lesser sized particles may be inhaled but those above 3 microns will not go into the lungs and will be eliminated from the body within a few days. Normal production of plutonium produces particle sizes ranging up to 20 microns. Moreover, due to plutonium's "stickiness", plutonium particles may adhere to other substances in the air, thereby increasing the plutonium particle's size. (A. 397-398, 402)

Exposure. Assuming dispersal of particles which could be inhaled into the lungs the number of persons which could be affected depends upon the number of persons, if any, in the area to or over which the particles travel. The extent of the exposure of these persons is also dependent upon the amount which they inhale. (A. 398) Again it is obvious that the dispersal of a small amount of plutonium over a large area would limit the amount any one person could inhale.*

---

* While appellees in no way dispute that plutonium in inhalable form is a highly radiotoxic material, appellant's attempt to portray millions of deaths caused by the release of small quantities of it is without basis. That appellant is playing what can only be called a numbers game may be seen by comparing two affidavits it submitted. In one Dr. John Gofman discusses a hypothetical accident postulated in the prior affidavit of Dr. Marvin Resnikov submitted by appellant. (A. 640-653, 790-791, 143-154) As appellant frequently recites, according to Dr. Gofman millions of people would die in such an accident. In Case C, the most likely one according to Dr. Resnikov, Dr. Gofman predicted 6,300,000 people would die. (A. 791) Dr. Resnikov, on the other hand, prophesized 2,489 deaths under the same circumstances and assuming that the persons involved took no evasive action and stayed in the region, but that is never mentioned in appellant's brief. (A. 153)

Even Dr. Resnikov's predictions and hypothetical assumptions were unfounded as shown by the affidavit of Robert F. Barker whose conclusions are also supported by the draft EIS on the air transportation of radioactive materials. (A. 400-405, S.A. Volume II, Chap. V). In addition, there are established actions which would be taken in the event of the release of plutonium due to an aircraft accident and which would mitigate possible effects of the release. (See A. 398-399)

Appellant's claims of mass deaths may also be seen to be unfounded from the fact that five tons, or aproximately five million grams, of plutonium have already been released into the atmosphere due to weapon testing. (A. 397) Moreover, studies of persons who have been exposed to plutonium for 23 to 24 years and have accumulated quantities of it in their bodies have shown no physical changes not attributable to the natural aging process. (A. 393)

Security Arrangements for Shipments of SNM

Requirements for the physical protection of SNM while in transit are set forth in 10 CFR §§ 73.30 through 73.36. They apply to strategic quantities of SNM ("SSNM") which are high enriched U-235 in excess of five kilograms and U-233 or plutonium in excess of two kilograms. § 73.30. These threshold quantities are substantially less than those necessary to make a crude nuclear device. (A. 425, S.A. 1136) Low enriched uranium does not pose a threat even if diverted and therefore is not covered by these regulations. (A. 425, S.A. 1136)

Examples of some of the more relevant regulations are as follows. All shipments by road must be made in vehicles equipped with a radiotelephone and there must be frequent communication between the vehicle and the licensee or his agent. § 73.31(b). There must be at least two persons in the cargo vehicle and the shipment must be further protected by either at least two armed guards accompanying the vehicle in a separate escort vehicle, which is in radio communication with the cargo vehicle, or the cargo vehicle must be specially designed to reduce vulnerability to diversion. § 73.31(c).

If the shipment is to or from an airplane, the SSNM must be under continuous observation by at least one guard while it is being transferred to or from the airplane. The cargo compartment must also be under observation until the plane departs or as soon as it arrives, as the case may be. § 73.35(b). Similarly, the licensee or his agent must be notified when the plane departs and when the material arrives at its destination. § 73.35(b) and § 73.36. NRC must also be notified by each licensee when it receives a shipment or if the shipment fails to arrive at its destination at the estimated time of arrival. § 73.36(e). NRC maintains a force of in-

spectors in the field to inspect selected shipments of SSNM at various points en route to assure that the regulations are being followed. (A. 426)*

Air transportation of SSNM has significant advantages over other modes of transportation from a security standpoint. It minimizes transit time, thereby reducing the opportunity for theft or sabotage. Additionally, while SSNM is aboard a cargo aircraft in flight, the only potential source of hijacking is from those already aboard the aircraft. On the other hand, SSNM which is transported by rail, sea or road is subject to potential hijacking from external sources during the entire time it is in transport. (A. 429)

The records of the NRC and its predecessor, the AEC, show that in the more than 25 years that SNM has been transported, no shipment of SNM, whether in strategic quantities or lesser amounts, has ever been sabotaged or stolen. (A. 426-427).**

Effect of a Preliminary Injunction

The effect of an injunction upon NRC and Agreement State licensees and upon ERDA would be to deny them the most rapid means of transportation when speed may

---

* Some of the actual practices of Edlow International Company, which transports more than one-half of all of the NRC licensee shipments of SSNM made in the United States, are detailed in the affidavit of its Vice-President, Jack Edlow, (S.A. 1135-1141). The company uses armored trucks with armed guards to transport SSNM to or from an airplane and, since most airports permit this, the trucks go directly to the airplane. (S.A. 1138)

** Pursuant to federal regulations NRC and Agreement State licensees must advise the NRC of each transfer and receipt of SNM of one gram or more. (A. 426)

be essential or even when it would simply be more convenient or cost effective. For example, as foreseen and authorized by Section 502(3) of the ERDA Act, air shipments of plutonium isotopes with very short half lives are often necessary in order to preserve the plutonium's physical properties for use in research. Also, plutonium powered heart pacemakers are shipped by air from the manufacturer to hospitals for implantation, and the necessity of using air transportation in emergency situations is readily apparent. (For other examples see A. 239-240.)

A sudden halt of air transportation of all SNM could also have a severe impact upon American foreign relations. (A. 268-274) The United States is a major international supplier of nuclear materials, including SNM, pursuant to approximately 29 Agreements for Cooperation it has entered into. Under these agreements it exports and imports SNM, primarily enriched uranium, and air transportation is used extensively in this international program. (A. 258, 265-267, 272)

The reputation and position of the United States as a responsible and dependable supplier of nuclear materials are important to the effective implementation of this international program, which not only provides important economic benefits to the United States, but also permits the United States to further its policy of curtailing the proliferation of nuclear weapons.*

A sudden halt of air shipments of SNM to and from the United States, and the inevitable delays it would cause, could undermine the carefully established reputa-

---

* Foreign sales of nuclear equipment and materials are expected to bring a cumulative balance of payments benefit to the United States of 25 billion dollars by 1990. (A. 271)

tion of the United States as a dependable source of nuclear materials. This could lead foreign countries to either turn to other governments as alternative sources, which may not insist on the same guarantees required by the United States, or develop their own facilities to produce such materials. In either case, the United States would not only lose important economic benefits, but also the ability to assure the peaceful use of SNM. (A. 271-272) Doubts have already been created in the minds of foreign countries as to United States dependability as shown by inquiries and protests from a number of foreign governments. A sudden and complete halt of air transportation would only make the situation worse. (A. 268-269, 273)

ARGUMENT

POINT I

This Court lacks jurisdiction over the appeal from the district court's May 7, 1976, decision concerning appellant's second motion for a preliminary injunction.

At the outset it is necessary to determine which appeals from the decisions of the district court relating to appellant's two motions for a preliminary injunction are properly before this Court. The first motion, made in May 1975, sought an injunction halting the air transportation of SNM pending completion of an EIS. The motion was denied by Judge Conner in his decision of September 9, 1975, and appellant filed a notice of appeal on November 7, 1975.

The second motion was made on December 12, 1975, while the appeal of the denial of the first motion was already pending. It differed from the first in that it would have substituted military air transportation of enriched uranium for commercial air transportation until the EIS

was completed.* The district court, in its May 7, 1976 decision, ruled that it lacked jurisdiction because of appellant's pending appeal and that an evidentiary hearing was necessary. (S.A. 1190-1207) Appellant has also appealed from that decision.

Apparently, as will be seen throughout this brief, counsel for appellant believes that any decision of the district court unfavorable to it is automatically appealable. This Court, however, lacks jurisdiction over the appeal concerning appellant's second motion.

The jurisdiction of appellate courts over interlocutory orders concerning preliminary injunctions is set forth in 28 U.S.C. § 1292(a)(1), which provides, in pertinent part, for jurisdiction over appeals of "interlocutory orders . . . refusing . . . injunctions . . ." In the present case, the district court's decision of May 7, 1976, does not contain any order refusing a preliminary injunction. It could not have since the District Court acknowledged that it lacked jurisdiction to hear the motion in the first place. Moreover, the court held that appellant's position involved a number of essentially factual questions which could not be resolved without the aid of an evidentiary hearing and that could not be held unless appellant applied to this Court for leave. (S.A. 1200, 1204)

Appellant only argues that there was a denial here because:

> The direction at this late date for a lengthy evidentiary hearing amounts to a denial of the second preliminary injunction motion. [Appellant's Brief at 30].

---

* It also would not have applied to U-233 which only exists in experimental quantities. (S.A. 1024)

However, appellant cites no case to support this proposition nor could one be found.* Moreover, appellant's attempts to blame the district court for undue delay in this action, and even to imply bad faith on its part (see Appellant's Brief at 30n), are without basis. Appellant has never made any significant attempt to expedite this action and rather has consistently taken steps causing delay.

For example, Judge Conner denied appellant's first motion for a preliminary injunction on September 5, 1975, after having to consider voluminous and highly technical papers submitted to him. Appellant waited until November 7, 1975, almost the full 60 days, before it filed its notice of appeal. Instead of pursuing that appeal it inexplicably made its December motion seeking essentially the same relief as in its first motion. It relied upon all of the papers it submitted in support of its first motion and submitted only three additional affidavits which it could, and should, have submitted previously in support of its first motion.**

Even if this Court concludes that it has jurisdiction under 28 U.S.C. § 1292, the holding of the district court that it lacked jurisdiction over the motion because the matter was already on appeal and

---

* For the proposition that inaction by a court in the absence of extraordinary circumstances does not constitute a denial of a motion for a preliminary injunction see *NAACP* v. *Thompson*, 321 F.2d 199 (5th Cir. 1963) and *United States* v. *City of Jackson, Miss.*, 519 F.2d 1147 (5th Cir. 1975).

** Appellees acknowledge, however, that a remand for further proceedings would probably not be effective. Appellant seeks a preliminary injunction pending completion of a final EIS on the air transportation of SNM. The final EIS is presently scheduled for November which would probably not give the district court time for an evidentiary hearing before the action is mooted by the existence of a final EIS.

therefore jurisdiction had passed to the Court of Appeals should be affirmed. *Turner* v. *HMH Publishing Co.*, 328 F.2d 136, 137 (5th Cir. 1964); *Ideal Toy Corp.* v. *Sayco Doll Corp.*, 302 F.2d 623, 625 (2d Cir. 1962).

Appellant argues that the district court mistakenly relied upon *Ideal Toy* because there a motion was made under Rule 62(c) of the Federal Rules of Civil Procedure while here plaintiff was making a new motion under Rule 65(a). However, as Judge Conner stated, plaintiff's December motion was essentially the same as its September motion so that plaintiff was in fact seeking to reopen the District Court's prior decision under Rule 62(c).

In any event, whether appellant made a new motion or not is irrelevant. The rationale of *Ideal Toy* is that once an appeal is taken from a decision concerning a motion for a preliminary injunction, the district court only has jurisdiction to maintain the status quo and that jurisdiction is based upon Rule 62(c). The district court cannot hear new evidence or argument on its decision unless leave is granted by the Court of Appeals.

In the present case, appellant's December motion did not seek maintenance of the status quo, rather it sought the preliminary injunction which had previously been denied. As Judge Conner noted, it was identical to appellant's first motion except for the *de minimus* change that would have permitted military air transportation of enriched uranium. Even appellant acknowledged in its supporting memorandum that a decision on its motion could make prosecution of the appeal of the earlier decision denying a preliminary injunction unnecessary. (S.A. 1203) Under the rationale of *Ideal Toy*, appellant should have first obtained leave from this Court to make

its motion. Having failed to do that, the district court properly held that it lacked jurisdiction.

POINT II

The district court did not abuse its discretion by its September 9, 1975 order denying appellant's first motion for a preliminary injunction.

In reviewing a denial of a motion for preliminary injunction this Court is limited to determining whether there was a clear abuse of discretion by the district court or a clear mistake of law. *Triebwasser & Katz* v. *A.T.&T.*, — F.2d —, Docket No. 76-7095 (2d Cir. May 17, 1976); *Gillespie & Co. of New York, Inc.* v. *Weyerhauser Co.*, — F.2d —, Docket No. 75-7569 (2d Cir. April 1, 1976); *Biderman* v. *Morton*, 507 F.2d 396 (2d Cir. 1974); *Pride* v. *Community School Board of Brooklyn*, 482 F.2d 257, 264 (2d Cir. 1973); *Checker Motors Corp.* v. *Chrysler Corp.*, 405 F.2d 319, 323 (2d Cir. 1969). Where the decision of the district court is based solely upon papers which are also before the Court of Appeals and not upon an assessment of credibility of witnesses, then the Court of Appeals may review the papers *de novo*. *Munters Corp.* v. *Burgess Industries Inc.*, — F.2d —, Docket No. 76-7082 (2d Cir. June 2, 1976); *San Filippo* v. *United Brotherhood of Carpenters and Joiners*, 525 F.2d 508 (2d Cir. 1975).

A preliminary injunction is extraordinary relief and the party seeking it has a heavy burden. *Pride* v. *Community School Board of Brooklyn*, *supra* at 264. In seeking a preliminary injunction, the movant bears the burden of demonstrating either a combination of probable success on the merits and the possibility of irreparable injury or that it has raised serious questions going to the merits and that the balance of hardships tips sharply in

its favor. *Munters Corp.* v. *Burgess Industries Inc., supra* at 3967 n.2; *Triebwasser & Katz* v. *A.T.&T., supra* at 3756; *Pride* v. *Community School Board of Brooklyn, supra* at 264.

The normal function of a preliminary injunction is to maintain the status quo pending a full hearing on the merits as this Court most recently said in *Triebwasser & Katz* v. *A.T. & T., supra* at 3759. This is equally true where an injunction is sought in a NEPA case. *Jones* v. *District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 512-513 (D.C. Cir. 1974).

As Judge Conner stated, consideration of whether a court should grant a preliminary injunction involves weighing the following three factors against each other: the likelihood of ultimate success on the merits, irreparable injury and the balance of hardships. The district court wrote in its decision below:

> Consideration of whether the Court should grant the extraordinary remedy of preliminary injunction involves the analysis of three criteria—likelihood of ultimate success on the merits, irreparable injury, and the balance of hardships. *Sanders* v. *Air Line Pilots Association, International* 473 F.2d 244, 248-49 (2d Cir. 1973), and cases cited therein; *Heldman* v. *United States Lawn Tennis Association*, 354 F. Supp. 1241, 1249-50 (S.D.N.Y. 1973).
>
> These three elements are not considered separately but in combination, each weighed against the others. *Sanders* v. *Air Line Pilots Association, International, supra* at 248; *Semmes Motors, Inc.* v. *Ford Motor Company*, 429 F.2d 1197, 1205-06 (2d Cir. 1970); *Checker Motors Corp.* v. *Chrysler Corp.* 405 F.2d 319, 323 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969); *Dino De Laurentiis*

Cinematografica, S.p.A. v. *D-150, Inc.*, 366 F.2d 373, 375 (2d Cir. 1966); *Heldman* v. *United States Lawn Tennis Association, supra* at 1250. [A. 896]

Thus in order to obtain a preliminary injunction, appellant must make, among other things, a clear showing of the threat of irreparable injury. *Triebwasser & Katz* v. *A.T.&T., supra; Capital City Gas Co.* v. *Phillips Petroleum Co.*, 373 F.2d 128 (2d Cir. 1967). The injury cannot be theoretical or speculative for the remote possibility of suffering injury is not a sufficient basis for granting a preliminary injunction. *Crowther* v. *Seaborg*, 415 F.2d 437 (10th Cir., 1969); *Holiday Inns of America, Inc.* v. *B & B Corp.*, 409 F.2d 614 (3d Cir. 1969); *Capital City Gas Co.* v. *Phillips Petroleum Co., supra* at 131; *Crimmins* v. *American Stock Exchange, Inc.*, 346 F. Supp. 1256 (S.D.N.Y. 1972). As was said in *Holiday Inns*:

> We must protect that which is protectable, but, in so doing, we must limit the use of injunctive relief to situations where it is necessary to prevent immediate and irreparable injury. The dramatic and drastic power of injunctive force may be unleashed only against conditions generating a presently existing actual threat; *it may not be used simply to eliminate a possibility of a remote future injury*, or a future invasion of rights, be those rights protected by statute or by the common law. [409 F.2d at 618; emphasis added]

Similarly, in *Crowther* v. *Seaborg, supra*, the plaintiff sought a preliminary injunction enjoining the AEC from conducting a peaceful underground nuclear test. The court in affirming the denial of the injunction said:

> [Plaintiff's case] is totally lacking in support of the necessary ingredient of irreparable damages. Such damages, under the undisputed evidence are

> very remote and not within the realm of probability. As they have in connection with the many other underground nuclear explosions detonated in the past, the Atomic Energy Commission and the other cooperating governmental agencies are exercising the highest degree of care, caution and expertise to prevent any possible damage to life, property and natural resources. [415 F.2d at 439]

In *Capital City Gas Co.* v. *Phillips Petroleum Co.* this Court stated:

> The most significant condition which must be present to support the granting of a temporary injunction is a showing that if the relief is not granted irreparable injury during the pendency of the trial will result. [373 F.2d at 131]

A. The district court correctly denied appellant's first motion for a preliminary injunction.

The district court correctly applied these principles for determining whether to grant a preliminary injunction in its September 9, 1975 decision (A. 895-911) and subsequent events, such as passage of the ERDA Act, further support the exercise of its discretion in refusing a preliminary injunction. As to whether appellant had shown probability of success on the merits, the district court did not address that question. It held that, even assuming appellant had, appellant was still not entitled to a preliminary injunction because it had not met the other tests for a preliminary injunction.* Before turning to

---

* Appellant continues in this appeal to assert that it has shown probable success on the merits. While there is no need to reach this issue, it should be noted that appellees in no way concede that they are in violation of NEPA and that appellant's arguments ignore certain serious questions. For example, since

[Footnote continued on following page]

the three reasons advanced by Judge Conner for denying the motion for a preliminary injunction, there is another reason which justifies his denial.

1. A preliminary injunction would be in contravention of Congressional legislation and intent.

Since this action was commenced, Congress has extensively legislated in the area and by its actions has determined what is in the public interest. Granting the injunction appellant seeks would be in direct conflict with federal statutes and Congressional intent.*

As to plutonium, Congress has passed the NRC and ERDA Acts which, while prohibiting most air shipments of plutonium, expressly allow certain shipments. The injunction appellant seeks would halt all such shipments in direct contravention of these laws. Even if these laws did not prevent a court from enjoining all air shipments of plutonium, they at the very least are an expression of Congress' determination that certain shipments of SNM are in the public interest and must be continued. In fact, Congress in passing these Acts was responding to this very lawsuit. For example, Senator Ribicoff in the debate over the ERDA Act refers to "expert testimony in a court action being brought by the

---

the NRC Act prohibits the present air transportation of plutonium, other than in medical devices, there is no reason for an EIS to be prepared on this point because no major federal action is being taken. (NRC is in fact going ahead with the EIS because it is intended to assist the Commission in reviewing its regulations.) The ERDA Act imposes the same prohibition on ERDA with few exceptions.

* At the time of Judge Conner's September 9, 1975, decision denying a preliminary injunction, the NRC Act had only recently been enacted and the ERDA Act was only under consideration. (A. 903-904)

Attorney General of New York." 121 Cong. Rec. S14603 (daily ed. July 31, 1975).*

As to enriched uranium, Congress' conscious failure to prohibit air shipments of this material is strong evidence of its intent that such shipments continue. Well before appellant commenced this action, Congress directed the President to prepare a report regarding safeguarding SNM including safeguarding domestic shipments of SNM. (A. 450-576) Thus Congress, which received the report in May 1975, was and is aware of the security concerns expressed by appellant in this action, however, Congress has chosen not to take the drastic action appellant seeks.

Moreover, by enacting the Hazardous Materials Transportation Act (effective January 3, 1975), Congress expressed its desire that hazardous materials, including radioactive materials, continue to be transported in regular interstate commerce subject to uniform federal standards. As to radioactive materials, including enriched uranium, carried on airplanes, the only limitation is that they cannot be carried on passenger aircraft unless they are "intended for use, in, or incident to, research, or medical diagnosis or treatment, so long as such materials as prepared for and during transportation do not pose an unreasonable hazard to health and safety." 49 U.S.C. § 1807. Shipments of high enriched uranium which are

---

* Statements made by appellant's counsel to appellees' counsel indicate that Congressman Scheuer of New York, the House sponsor of the NRC Act, and/or his office was in contact with counsel for appellant at the time the NRC Act was under consideration. Apparently Congressman Scheuer also received copies of appellant's papers in support of its first preliminary injunction motion for he refers during the debate on the NRC Act to assertions contained in those papers. 121 Cong. Rec. H5895-5897 (daily ed. June 20, 1975). For the relevant legislative history of the NRC Act see that debate and 121 Cong. Rec. S14782 (daily ed. Aug. 1, 1975); for the ERDA Act see 121 Cong. Rec. S14602-14603 (daily ed. July 31, 1975).

not intended for research, medical diagnosis or treatment may be transported on all-cargo aircraft. Thus, the fact that Congress has purposely not prohibited air shipments of enriched uranium, while having done so for most air shipments of plutonium, shows Congress' judgment that such shipments should continue and it would be improper for a court to substitute its judgment for that of Congress as appellant seeks.

2. The tests for a preliminary injunction were not satisfied.

The district court correctly denied a preliminary injunction on the ground that appellant had not met all of the tests for a preliminary injunction. The district court held that appellant had not shown irreparable harm because the harm alleged was too remote and conjectural, that the balance of hardships was against appellant and that a preliminary injunction would upset rather than maintain the status quo.

The district court correctly held that the probability of injury was too remote to justify a preliminary injunction. Appellant's claim of injury was based upon a possible air accident causing a possible release of SNM and on the possible theft or diversion of SNM while in air or connecting ground transit. As to the danger of accidental release, a distinction must be made between shipments of enriched uranium and of plutonium. Appellant has conceded that enriched uranium, no matter what its degree of enrichment, does not pose any danger even if released due to an airplane accident. (A. 642 and Appellant's Brief at 17 and 28). Thus appellant concedes that the danger of accidental release is not a ground for enjoining the air transportation of enriched uranium.

Nor is it a basis for enjoining air transportation of plutonium. The NRC Act prohibits present air shipments

of plutonium by NRC and Agreement State licensees (other than in medical devices designed for individual human application) thereby making any injunction of such shipments unnecessary. The ERDA Act similarly prohibits air shipments of plutonium by ERDA with certain specified exceptions such as medical shipments and shipments for national security or public health purposes. Thus appellant's accidental release claim is based upon a handful of air shipments of plutonium, all performed by the federal government and all expressly sanctioned by Congress.

In light of the fact that SNM has been carried by commercial aircraft for over 25 years without one aircraft accident involving them, it is inconceivable that appellant could show imminent irreparable harm sufficient to justify enjoining these few shipments for the time remaining before the EIS appellant seeks is completed. There are four factors which make the probability of harm remote. First, the probability of an airplane accident occurring is very low and even if one occurred it does not necessarily mean that cargo on board would be damaged. (A. 275-285) Second, considering the very small number of air shipments of plutonium permitted by the NRC and ERDA Acts, the probability that plutonium would be on an aircraft involved in an accident is extremely remote. Third, the containers used to transport plutonium are designed to withstand severe accident forces including those involved in an airplane crash. (A. 286-386) Thus even if plutonium were on an airplane involved in an accident, it is still improbable that the container carrying the plutonium would fail. Finally, even in the unlikely event that a container were to fail, it is still remote that significant harm would result due to the large number of variables involved. (A. 387-423)

For equally good reasons the district court rejected appellant's claim of danger from possible terrorist

acts. Here too one must distinguish between different types of SNM. Federal regulations impose security requirements on SSNM which is at least five kilograms of high enriched U-235 or two kilograms of plutonium or U-233. These threshold levels are substantially less than the amount necessary to produce a nuclear device. Low enriched U-235, such as used in commercial reactors, does not pose any danger and is not included.

The same security arrangements apply to the transportation of SSNM when it is being shipped totally by surface means between two points as when it is shipped to or from an airplane. Thus air transportation makes no difference except for the time it is on board the airplane.

In fact, as Judge Conner held "from the standpoint of vulnerability to terrorism, air transport has clear-cut advantages over surface transport." (A. 904) Air transportation reduces the time that the SSNM is in transit and therefore the time it is exposed to possible theft. In addition the only access to the shipment is before and after the flight while a surface shipment is open to attack from external sources at every point throughout its transit. Thus appellant never did, and in fact could not, show that air transportation of SNM is any less secure than other modes of transportation.

The district court also correctly decided that the harm caused by granting an injunction outweighs any harm from denying it. Balanced against the highly speculative claims of appellant is the fact that an injunction would, as Judge Conner held, "require appellees to significantly alter a method of transporting SNM which has existed for over twenty-five years without incident." (A. 905) It would deny shippers of SNM, including the federal government, the speed, convenience and cost savings that air transportation provides. Finally, it could affect the policy of the United States of preventing the proliferation of nuclear weapons.

Judge Conner's last reason for denying the preliminary injunction was that an injunction would not maintain the status quo but rather disrupt it. As of now appellant seeks to halt a method of transportation which has been used for over 25 years without injury to anyone and to halt it for the remaining time it will take to complete the EIS which has already been issued in draft form. Moreover, as more fully discussed below, in NEPA cases where injunctions have been granted usually some type of construction was involved or another activity which if allowed to continue would render an EIS a meaningless and hollow gesture. Here, as Judge Conner held, it would be no more, or less, difficult to modify the regulations governing the transportation of SNM if the preliminary injunction were denied. (A. 901)

In sum, the district court properly exercised its discretion in denying appellant's motion for a preliminary injunction and should be affirmed by this Court.

B. Appellant has failed to show that the district court abused its discretion in denying appellant's first motion for a preliminary injunction.

Appellant presents three arguments why the district court erred in refusing to grant the preliminary injunction it sought, all of which lack merit.

1. Appellant is not entitled as a matter of law to a preliminary injunction

Appellant first argues that it is entitled to a preliminary injunction as a matter of law because a violation of NEPA *per se* constitutes irreparable harm. However, the law is abundantly clear that Congress did not create a mandatory right to an injunction where there has been a violation of NEPA, rather preliminary or permanent

injunctive relief is available only where the party seeking such relief demonstrates that the equities require it. *Conservation Society of Southern Vermont, Inc.* v. *Secretary of Transportation*, 508 F.2d 927, 933-934 (2d Cir. 1974), *vacated on other grounds and remanded*, 423 U.S. 809 (1975); *Greene County Planning Board* v. *Federal Power Commission*, 455 F.2d 412, 424-425 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); *Steubing* v. *Brinegar*, 511 F.2d 489 (2d Cir. 1975); *Biderman* v. *Morton*, 507 F.2d 396 (2d Cir. 1974); *Jones* v. *District of Columbia Redevelopment Land Agency, supra; State of Ohio ex rel. Brown* v. *Callaway*, 497 F.2d 1235 (6th Cir. 1974); *Environmental Defense Fund, Inc.* v. *Callaway*, 497 F.2d 1340 (8th Cir. 1974); *Proetta* v. *Dent*, 484 F.2d 1146 (2d Cir. 1973); *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F.2d 796 (D.C. Cir. 1971); *Lathan* v. *Volpe*, 455 F.2d 1111 (9th Cir. 1971); *Minnesota Public Interest Group* v. *Butz*, 358 F. Supp. 584, 624-625 (D. Minn. 1973), *aff'd*, 498 F.2d 1314 (8th Cir. 1974); *Environmental Defense Fund, Inc.* v. *Froehlke*, 348 F. Supp. 338 (W.D. Mo. 1972), *aff'd*, 477 F.2d 1033 (8th Cir. 1973). As this Court stated in *Conservation Society of Southern Vermont:*

> Although the procedural requirements of NEPA must be followed scrupulously and cost or delay will not alone justify noncompliance with the Act, where the equities require it remains within the sound discretion of a district court to decline an injunction, even where deviations from prescribed NEPA procedures have occurred. [508 F.2d at 933-934; footnotes omitted].

Similarly in *Greene County Planning Board* v. *Federal Power Commission, supra* at 424-425, this Court held that as to certain portions of a power line construction: "[T]here can be no question that the Commission failed to comply with NEPA . . . . [n]evertheless, we find no

compelling basis for halting construction of the lines so far advanced . . . ."

As most recently stated by this Court at page 3 of its order in *The East 63rd Street Association* v. *Coleman*, Docket No. 76-6083 (2d Cir. May 18, 1976):

> We also note that even if there were violations of the National Environmental Policy Act, which we by no means find, the district court has substantial discretion to determine whether an injunction should issue. *See Conservation Society of Southern Vermont, Inc.* v. *Secretary of Transportation*, 508 F.2d 927, 935 (2d Cir. 1974), *vacated on other grounds and remanded*, 423 U.S. 809 (1975).

Moreover, the present action shows a basic flaw in appellant's position. If appellant were correct that NEPA was violated here and therefore an injunction must automatically issue, then, for example, all air shipments of heart pacemakers containing plutonium must stop. Presumably even appellant would concede that such shipments should continue. But if this is so, then clearly courts must have the discretion to grant injunctions which appellant's argument would deny them.

In support of its argument, appellant cites *Scherr* v. *Volpe*, 466 F.2d 1027 (7th Cir. 1972); *Environmental Defense Fund* v. *TVA*, 468 F.2d 1164 (6th Cir. 1972) and *Izaak Walton League of America* v. *Schlesinger*, 337 F. Supp. 287 (D.D.C. 1971). However, as Judge Conner held, none of these stand for the broad proposition appellant asserts. (A. 898)

In these cases, as in other NEPA cases where injunctions were granted, preliminary injunctions were not granted merely because of a violation of NEPA.

Rather they were granted because in the absence of injunctive relief actual, imminent irreparable injury, such as the destruction of a forest or pollution of a river would result or there would have been an irreversible and irretrievable commitment of resources which would render the EIS ineffectual.

This latter point was stated in *Jones* v. *District of Columbia Redevelopment Land Agency, supra*, when the court said:

> So long as the *status quo* is maintained, so long as the environmental impact statement is not merely a justification for a *fait accompli*, there is a possibility that the statement will lead the agency to change its plans in ways of benefit to the environment. It is this possibility that the courts should seek to preserve. [499 F.2d at 512-513; footnotes omitted].

No different result is required by *Natural Resources Defense Council, Inc.* v. *The United States Nuclear Regulatory Commission*, — F.2d —, Docket Nos. 75-4276 and 75-4278 (2d Cir. May 26, 1976). There this Court prohibited NRC from granting interim licenses for commercial utilization of mixed oxide fuel related activities until NRC completed a generic impact statement on the subject. The basis for the Court's decision was that such licensing would result in such a substantial commitment of resources that the decision on whether to permit wide scale commercial activity would be substantially affected and the EIS would be rendered meaningless. Thus the Court permitted NRC to grant licenses for "experimental and feasibility purposes in the interim period" apparently because it considered that such activities would not render the EIS a useless ritual by foreclosing

the decision before the EIS was prepared. (See Slip Op. at 3934-3937).*

Here the air transportation of SNM has been going on for 25 years. There is no evidence that such transportation will significantly increase in the time required to complete the EIS. In fact, the NRC and ERDA Acts have undoubtedly caused a decrease in such shipments. Thus continuance of such transportation would not constitute such a substantial commitment of resources that the EIS now being completed would be rendered ineffective.

Appellant argues that the EIS could be rendered meaningless if there were an accident, but its point only confuses the two factors discussed above of imminent harm and irretrievable commitment that courts consider in determining whether to grant an injunction in a NEPA case. The purpose of the EIS is to allow an agency to make a decision taking into account relevant environmental factors. That could still occur here even if there were an accident. Appellant's point then really goes to whether the activity should be enjoined because there would be irreparable harm before a decision based upon

---

* Even the cases cited by appellant have express language showing that their main concern was either to prevent actual irreparable injury or an irretrievable commitment of resources. One such passage was quoted in Judge Conner's decision. (A. 899). In another, appellant quotes extensively from *Scherr* v. *Volpe* (Appellant's Brief at 41-42) but omits the following sentence which immediately follows the quoted part and shows that the court was concerned about an irretrievable commitment of resources:

> Here if the [highway construction] project were allowed to proceed after the plaintiffs had demonstrated a probability of success on the merits, this 'careful and informed decision-making process' would be lost forever. [466 F.2d at 1034]

an EIS is made but, as shown herein, appellant has never established such claim.

2. Appellant has not shown irreparable harm sufficient to justify an injunction.

Appellant next argues that even if it were not entitled to a preliminary injunction as a matter of law, the facts demonstrate the possibility of irreparable harm and therefore the district court abused its discretion in denying a preliminary injunction. Before turning to the facts appellant alleges, it must be noted that appellant is wrong on the law.

Appellant in essence argues that the merest possibility of injury is sufficient to justify an injunction. Obviously that is wrong for, since almost all activities involve some risks, almost anything could then be enjoined. Moreover the cases cited by appellant in no way support its expansive view of the law. For example, in *Chelsea Neighborhood Ass'n* v. *United States Postal Service*, 389 F. Supp. 1171 (S.D.N.Y.), *aff'd*, 516 F.2d 378 (2d Cir. 1975), the district court granted an injunction not out of concern about some remotely possible harm, but rather about what it called "imminent" harm that defendant would let a contract thereby committing defendant to construct the building in question and making preparation of an EIS a hollow gesture. 389 F. Supp. at 1185-1186.*

Turning to the facts, appellant has not shown any imminent irreparable harm. It will not be possible or

---

* In fact on appeal this Court said that it would be willing to consider a stay of the injunction if the Postal Service wished to take the risk of accepting one of the bids that had been made on the assumption that an EIS still favoring construction of the building would be filed in the near future. 516 F.2d at 389-390.

useful to deal with all of appellant's allegations, however, a few examples will show their lack of merit.

First, appellant unfortunately waits until page 57 of its brief to inform this Court of the ERDA and NRC Acts which have halted almost all air shipments of plutonium. All through its brief it attempts instead to create the impression of thousands of such shipments, when there are presently only a very small number.

As to these shipments, appellant glosses over the fact that they were expressly authorized by Congress and that appellant is therefore asking the courts to override Congress' determinations. Moreover, both Acts permit air shipments of plutonium designed for medical applications. Is appellant asking that these shipments be halted? Yet if these shipments are permissible because Congress authorized them, then so must be the other shipments exempted by Congress.*

---

* Again it is unfortunate to note that appellant's arguments include an assertion, without any basis, of bad faith on the part of ERDA. At page 57 of its brief appellant writes: "When ERDA promulgated regulations regarding the 'national security' exemption, it did so without prior notice and wrote with a predictably sweeping hand." However, as stated in the notice issued by ERDA, 41 Fed. Reg. 6259 (February 12, 1976), and as authorized by 5 U.S.C. § 553, there was no prior comment period because continuation of air shipments for national security purposes was essential to the maintenance of the national defense and permitting prior comment would have caused an interruption contrary to the public interest. The same notice gave interested persons the opportunity to comment as to whether the regulations should be revised. ERDA never received any such comments from appellant. Moreover the fact that in the first four months after enactment of the ERDA Act there were only 13 air shipments of plutonium by ERDA, shows that ERDA is strictly following Congress' direction and not acting in bad faith as counsel for appellant irresponsibly implies.

Secondly, appellant repeatedly fails to distinguish between plutonium and enriched uranium and the different types of each of these. Moreover the injunction it seeks would ban shipments which even it would concede do not pose any risk, yet it makes no attempt to exclude such shipments. For example, low enriched uranium used to fuel commercial reactors does not pose a danger from accidental release or seizure by terrorists, yet appellant would include air shipment of it in its total ban.

Third, appellant's complaint about the threat of terrorism is essentially based upon the danger of hijacking SNM.* However, as shown above and as Judge Conner held, air transportation reduces this possibility in two ways. First it reduces the time the material is in transit and secondly while in the air it is not subject to being hijacked from outside sources. Appellant never refutes these obvious facts, rather it baldly states that it does not have to establish that air transportation of SNM is more hazardous than surface transportation. This is illogical. If air transportation is at least as secure, if not more secure than ground transportation, then why

---

* In its discussion of terrorism, appellant places almost total reliance upon affidavits submitted by appellant in connection with its December 12, 1975, motion for a preliminary injunction. Since this Court lacks jurisdiction over the appeal on that motion, as shown in Point I above, the affidavits are not properly before this Court and appellant may not rely upon them. Even if appellant could properly rely upon them, the responding affidavits submitted by appellees show their deceptive nature. For example, appellant relies upon an affidavit of Captain Eckols which is a collection of hearsay statements and sensational allegations. (S.A. 1043-1054) The misleading nature of his affidavit is shown by the responding affidavit of Jack Edlow. (S.A. 1135-1141)

is appellant seeking to eliminate air transportation of SNM on this ground?*

3. The district court did not err in balancing the hardships.

Appellant's final argument is that the district court erred in holding that it could balance the harm that would be created by an injunction against the harm involved if it were not granted and, secondly, in determining that this balance was in fact against appellant. Appellant's legal position is contrary to established law for it ignores the many decisions in which courts have balanced the hardships in determining whether to grant an injunction in a NEPA case. *Steubing* v. *Brinegar*, *supra* at 495, 497; *Conservation Society of Southern Vermont*,

---

* Appellant also avoids the issue by claiming that military air transport of SNM would be more secure than commercial air transport. This claim is not properly before this Court since it is part of appellant's second preliminary injunction motion and, as shown in Point I above, appellant has improperly appealed from the decision on that motion. In any event, the claim misses the point. The issue here is whether air transportation of SNM should be enjoined for the time it will take to issue a final EIS. Even if it were true that military air transportation is more secure, that does not mean that commercial air transportation in conformity with federal regulations will cause harm to the environment during this interim period. Moreover, appellant has never shown any authority for the use of the military to transport non-military commercial shipments. In fact, the Hazardous Materials Transportation Act assumes that radioactive materials, including SNM, will be carried in regular interstate commerce. It would seem, then, that using the military for this non-military purpose is something that Congress, and not a court, should authorize. Finally, it would obviously be an unnecessary burden to require commencement of a totally new method of transportation for the few months required before the final EIS is issued. Appellant is in effect then asking the Court to shortcut NEPA and force a substantial commitment of resources to a new project.

Inc. v. *Secretary of Transportation*, *supra* at 936-938; *Minnesota Public Interest Group* v. *Butz*, *supra* at 1323; *Environmental Defense Fund* v. *Froehlke*, 477 F.2d 1033, 1036-1037; *Greene County Planning Board* v. *FPC*, *supra* at 424-425; *Natural Resources Defense Council Inc.* v. *Morton*, 458 F.2d 827, 832 (D.C. Cir. 1972).

Even in non-NEPA cases where probability of success on the merits has been shown, it is appropriate for a court to balance the hardships in deciding whether to grant a preliminary injunction. *Dino deLaurentiis Cinematografica, S.p.A.* v. *D-150, Inc.*, 366 F.2d 373, 375 (2d Cir. 1966), cited approvingly in *Munters Corp.* v. *Burgess Industries, Inc.*, *supra*.

The district court properly balanced the hardships here and all appellant does in attempting to show that the court erred is to rest upon hypothetical events causing significant harm. But that is not the issue, for one could postulate such events for many other acceptable activities. For example, could not a 747 filled with passengers crash into Shea Stadium during a football game; could not a ship filled with gasoline explode in New York harbor; could not terrorists use weapons to blow up gasoline trucks making deliveries in crowded city areas? Surely the mere fact that one can conceive of such events and speculate as to their possible occurrence or impact is not a basis upon which to conclude that such activities should be banned, permanently or temporarily.

All of appellant's attempts to show that the district court erred in denying a preliminary injunction are based upon such speculative and conjectural events. The district court correctly exercised its discretion in holding that appellant had not shown facts sufficient to justify a preliminary injunction and its decision should be affirmed by this Court.

POINT III

This Court lacks jurisdiction over the appeal from the district court's denial of appellant's motion for partial summary judgment, which motion was in any event properly denied.

Pursuant to 28 U.S.C. § 1201, the Court of Appeals has jurisdiction of appeals from all "final decisions" of the district court. It is well established that the denial of a motion for summary judgment is not a final decision within the meaning of that statute and therefore is not an appealable order. *Clark* v. *Kraftco Corp.*, 447 F.2d 933 (2d Cir. 1971); *Lemelson* v. *Ideal Toy Corp.*, 408 F.2d 860 (2d Cir. 1969); *Chappell & Co.* v. *Frankel*, 367 F.2d 197 (2d Cir. 1966). Accordingly, this Court lacks jurisdiction over the appeal from the district court's decision of May 7, 1976 (S.A. 1190-1207) denying appellant's motion for partial summary judgment.*

Even if this court has jurisdiction, it should affirm the district court's denial of appellant's motion for partial summary judgment. Although the NRC has from a date prior to the commencemnt of this action made clear its intention to prepare an EIS and in fact has already completed and circulated for comment a draft EIS, appellant nonetheless sought partial summary judgment: 1) declaring that appellees are in violation of NEPA and 2) ordering appellees to complete the draft and final EIS by specified dates.

---

* The only arguably relevant exception to the non-appealability of interlocutory decisions such as the denial of the motion for summary judgment is 28 U.S.C. § 1292(b) which provides that the district court may certify that an order not otherwise appealable involves a controlling and disputed issue of law the resolution of which may materially advance the ultimate termination of the litigation. Judge Conner's decision contained no such certification and none was ever requested by appellant.

It is not disputed that the district court had "the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." *Zwickler* v. *Koota*, 389 U.S. 241, 254 (1967); *Roe* v. *Wade*, 410 U.S. 113, 166 (1973); *Steffel* v. *Thompson*, 415 U.S. 452, 468-469 (1974). The appropriate inquiry is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 122 (1974).

The district court's opinion of May 7, 1976, demonstrates clearly that in declining to grant appellant's request for summary declaratory relief, it made the requisite inquiry and properly concluded that under the then existing circumstances of the action, there was no substantial controversy of sufficient immediacy and reality to warrant the issuance of declaratory judgment. As the district court correctly found, appellant's request that appellees be declared in violation of NEPA would do no more than resolve an academic conflict—"a particularly inappropriate field for the judicial plow"—and would not in any way advance the ultimate objective of the lawsuit —prompt preparation of an EIS. (S.A. 1193) On the contrary, prior to Judge Conner's decision of May 7, a draft EIS had already been made available.

As the district court noted, there is no indication that the NRC has failed to proceed expeditiously in preparing the EIS. Appellant has offered nothing to rebut this conclusion. Accordingly, given the ongoing good faith preparation of the EIS which is the ultimate relief sought in the complaint, there is no longer a substantial controversy of any immediacy or reality and a declaration regarding

whether or not appellees are in violation of NEPA would not further in any way the ultimate objective of the lawsuit.

Similarly, while the setting of an arbitrary schedule for completion of the EIS—which Judge Conner declined to do—might arguably advance the date of completion, there is no reason to interfere with the administrative process by imposing such a schedule so long as appellees are proceeding in good faith. Indeed, as the district court properly noted, arbitrary deadlines imposed without knowledge of the scope or detail of the EIS or the time actually required to prepare such a document may well defeat the very purpose of the action by requiring those charged with preparing the EIS to sacrifice thoroughness and detail. (S.A. 1194)

Finally, the desired declaration would not gain appellant the injunctive relief it seeks. As shown above, it is well established in this Circuit that a NEPA violation of itself does not create a mandatory right to an injunction and preliminary or permanent injunctive relief is available only where the party seeking such relief demonstrates that the equities require it. Since appellant has not shown that the equities require a preliminary injunction, there is no need to reach the issue of whether appellees are in violation of NEPA.

POINT IV

This Court lacks jurisdiction of the appeal from the district court's decision dismissing the complaint as to the CAB and Customs.

As with the appeal from Judge Conner's denial of appellant's motion for summary judgment, appellant also ignores Rule 54(b) of the Federal Rules of Civil Procedure. Rule 54(b) provides that in an action involving

multiple parties, final judgment may be entered as to one or more but fewer than all the parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. It is not disputed that Judge Conner's decision of December 23, 1975 (A. 922-927) contains no such determination or direction nor did appellants seek an order pursuant to Rule 54(b) from the district court. Accordingly that decision is not a final decision and pursuant to 28 U.S.C. § 1291 this court lacks jurisdiction over the appeal from it. This Court's recent statement in *International Controls Corp.* v. *Vesco & Co., Inc.*, — F.2d —, Docket No. 75-7548 (2d Cir. May 13, 1976) is particularly in point:

> This court has repeatedly stressed the importance of strict adherence to the certification requirements of Rule 54(b). See, e.g., *Browning Debenture Holders Committee* v. *DASA Corp.*, 524 F.2d 811, 814 n.4 (2d Cir. 1975); Wright & Miller, Federal Practice and Practice and Procedure: Civil § 2660. The confusion surrounding the instant appeal demonstrates the need for such careful compliance.

See also *Kappelmann* v. *Delta Airlines*, — F.2d —, Docket No. 75-1830 (D.C. Cir. April 16, 1976); *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360, 362 (2d Cir. 1975); *Campbell* v. *Westmoreland Farm, Inc.*, 403 F.2d 939, 940 (2d Cir. 1968); *Wolfson* v. *Blumberg*, 340 F.2d 89 (2d Cir. 1965); *Backus Plywood Corp.* v. *Commercial Decal, Inc.*, 317 F.2d 339 (2d Cir.), *cert. denied*, 375 U.S. 879 (1963).*

---

* In any event, it is well established that neither the CAB nor Customs has any authority regarding the development or enforcement of safety regulations governing transportation of

[Footnote continued on following page]

CONCLUSION

The September 9, 1975, decision of the district court denying a preliminary injunction should be affirmed and this Court should hold that appellant's appeals from the district court's decisions of December 23, 1975, and of May 7, 1976, are not properly before it.

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the Defendants-Appellees.

CHARLES FRANKLIN RICHTER,
NATHANIEL L. GERBER,
SAMUEL J. WILSON,
Assistant United States Attorneys, Of Counsel.

SNM other than assuring compliance with relevant DOT and NRC regulations. As to Customs, see 42 U.S.C. § 2073 and 10 C.F.R. § 70. As to the CAB, see 49 U.S.C. §§ 1421, 1655 and 1801 and 14 C.F.R. § 221.38(a)(5). See also *Air Line Pilots Ass'n, Int'l* v. *CAB*, 516 F.2d 1269, 1270, 1276 (2d Cir. 1975); *Air Line Pilots Ass'n, Int'l* v. *CAB*, 494 F.2d 1118, 1127 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 972 (1975); *Voyager 1000* v. *CAB*, 489 F.2d 792 (7th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974). Moreover, pursuant to 49 U.S.C. § 1486 this Court has exclusive jurisdiction to review any order, affirmative or negative, issued by the CAB so that the district court did not have jurisdiction to consider appellant's claim against the CAB. See *Carey* v. *O'Donnell*, 506 F.2d 107 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); *Oling* v. *Air Line Pilots Ass'n*, 346 F.2d 270 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965). Finally, appellant has never asked the CAB to grant the relief in the complaint. Accordingly, appellant failed to exhaust its administrative remedies. See 49 U.S.C. §§ 1482, 1486(e). See also *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968).

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

29th day of June, 1976 she served ~~a~~ two copys of the within Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

Louis J. Lefkowitz
Attorney General of State of New York
2 World Trade Center
New York, New York 10047

Attention: John P. Shea, III
Assistant Attorney General

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

29th day of June, 19 76

Ralph L. Lee

RALPH L. LEE
Notary Public, State of New York
No. 41-[illegible]
Qualified in [illegible] County
Commission Expires March 30, 1977